Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JESSIE D. McDONALD,

Petitioner,

v.

OVERNITE EXPRESS, INC., et.al.,

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Dr. Jessie D. McDonald, Ph.D., Pro se
P.O. Box 280724
Nashville, Tennessee 37228
615-970-0316

QUESTION PRESENTED FOR REVIEW

Whether Rule 4(a)(1)(A) of Federal Rules of Appellate Procedure permit an appellate court to foreclose an indigent party of the right and opportunity to be heard on appeal, after the district court allowed the Plaintiff to proceed in forma pauperis [IFP], but denied a written request for the appointment of counsel and the opportunity to be heard, when the district court had prior knowledge of Plaintiff's employment as an over the road driver and not having access to the U.S. Mail to timely respond to pleadings, nor the financial resources to meet with the attorneys of record in Minneapolis, MN?

PARTY TO THIS PROCEEDING

An additional party to this proceeding in the court whose judgment is the subject of this petition is as follows:

Respondent: Transport Leasing Corp.; and Quail Trucking Co.;

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Jessie D. McDonald, Pro se [Petitioner, hereinafter], respectfully submit this application for a writ of certiorari to review a decision of the United States Court of Appeals for the Eighth Circuit.

OPINIONS AND ORDERS BELOW

The October 4, 2010 order on review from the Eighth Circuit Court of Appeals is unreported, and reproduced in the Appendix at App. #1;

There was no Motion to Rehear filed in the lower court.

The July 9, 2010 final judgment and order entered by the district court is also unreported and is reproduced in the Appendix at App. #2;

Over Petitioner's Objections, the district judge assigned this case to the Magistrate judge, disregarding my objection and the Report an Recommendation is reproduced in the Appendix at App. #3;

JURISDICTION

The judgment on review was entered on October 4, 2010 and there was no Motion to Rehear. This petition is timely applied for, based on the fact a request for extension of time, with the $300.00 filing fee, and was post marked January 3, 2010 and received by the Clerk of this Court on January 11, 2011, before the expiration of 90 days. This Court has jurisdiction under 28 U.S.C., § 1254(1), by virtue of the Fourteenth Amendment to the United States Constitution for the protection of due process and equal protection under the established laws.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 4(a)(1)(A) of Federal Rules of Appellate Procedure require appellants to submit a Notice of Appeal to the clerk of the district court before the expiration of 30 days, after the final order or judgment has been entered.

Fourteenth Amendment:

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

CONSTITUTIONAL AND STATUTORY PROVISIONS Continue

deny to any person within its jurisdiction the equal protection of the laws.....

STATUTORY PROVISION

42, USC, § 1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined
For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment the rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

STATUTORY PROVISION Continue

TITLE VII OF THE CIVIL RIGHTS ACT: OF 1964

SEC. 2000e-2. *[Section 703]*

(a) Employer practices:

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.;

STATUTORY PROVISION Continue

TITLE VII OF THE CIVIL RIGHTS ACT:
OF 1967

- Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex, or national origin;
- the Age Discrimination in Employment Act of 1967 (ADEA), which protects individuals who are 40 years of age or older;

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

This case was initiated by Jessie D. McDonald, [Petitioner, hereinafter], being a member of the Black or African American culture after making a complaint to the Equal Employment Opportunity Commission [E.E.O.C., hereinafter] against the named defendants for unfair employment practices, in violation of Title VII of the Civil Rights Acts of 1964, and 1967 as amended; 42, USC, § 1981, by virtue of 28, USC, § 1331.

The fact Petitioner is employed as an over-the-road driver, often have to wait two or three weeks before returning to Nashville to check the U.S. Mail. As a normal routine, do not have access to the proper means or the time on the road to make a reasonable response that is necessary for a legal proceeding. After, being unemployed for several weeks, the court allowed Petitioner to proceed in forma pauperis. Petitioner made a written request for the court to appoint counsel, but that request by motion was denied.

On one of the occasions Petitioner arrived in Nashville, Tennessee and was preparing a response to a district court proceeding, at the Vanderbilt University location of Kinko's Copy Center, when a lady that was later identified to Petitioner as being Judge A. Trauger, U.S. District Judge for the Middle District of Tennessee, rushed to the copier and took and read my cover sheet that was addressed to the district court in Minneapolis, MN. Judge Trauger then contacted the Clerk of the district court in the Eighth Circuit and talked with the trial judge in this case and informed her about a previous decision from this court, where the former Chief Justice, Rehnquist took it upon himself to show bias against me by singling me out and ordered me to pay the $300.00 filing fee, when seeking extraordinary relief, in an attempt to prejudice my rights to a fair and impartial hearing. In that case, the decision was split 5 to 4. It was his decision that carried the majority vote. That case visited this court more times than any case in the history of this court, well over 122 times and that should have been a red flag to show I needed the trial

court to appoint counsel for me. Petitioner states that there is a clear case of judicial misconduct by both Judge Trauger and Judge Ericksen and both judges should be reprimanded and/or sanctioned pursuant Rule 8, of this Court Rules.

Petitioner further states that, the case discussed made its first appearance in this court, in or near Mr. Justice Stephens' rookie year in this court, in 1976 and the issues in the case discussed had nothing in common with the case at bar since the case from this court involved a writ of habeas corpus application for a conviction on a charge Petitioner was never indicted on and the issues in the Eighth Circuit involves a wrongful termination of employment, based solely on race and age discrimination.

The final order in the district court was entered on July 9, 2010 and by a wrong calculation of time, I thought to be within the 30 days, to file the Notice of Appeal, I submitted a Notice of Appeal and money order for $455.00, filing fee, dated August 30, 2010 to the district court for an appeal, and mailed a copy to the Office of the Clerk in the appellate court, with a copy of the money order.

Conclusion of Facts

Since the district court thought the previous case was important to the case at bar, Petitioner believes in the interest of all fairness, this Court should know about other facts surrounding that case also. In the previous criminal case, the trial judge, Honorable Allen R. Cornelius, Jr., now retired informed me that, had he

knew me before I made an appearance in his court, there is no way he would have sent me to prison, and he repeated these words in the presence of the Honorable, A.A. Birch, Jr., retired Justice for the Tennessee Supreme Court and only African American to serve as Chief Justice of that court, whom I have known over forty years.

After the expiration of 19 months confinement, I was given an earlier parole date[1], which I declined. If I could not get justice from the court, I did not want mercy from the parole board. Ten days later I was evicted from the Tennessee State Penitentiary on December 7, 1977 at midnight, with enough money inmates contributed for me to run for Governor of Tennessee in 1978, against U.S. Senator, Lamar Alexander and inmates financed my entire campaign.

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[1] A high ranking security officer with the Department of Corrections informed me that, the administration blamed me for being responsible for depleting the entire budget for the Department of Corrections, three times during the first year of confinement.

During the exact same week of my termination at Overnite Express, all three of my sons, in three different professions, with three different employers were terminated from their employment after several years of employment. If there is a problem with me, my adversaries should deal with me and not my sons.

All three of my sons are good boys and not one has ever been before a criminal court to my knowledge, for any reason. My criminal case, without an indictment for the charge convicted under, destroyed my marriage of over fifteen years without a single separation, but I stayed active in my son's life and I believe I did ok. My son Michael, [45 Years old] was completing his studies for his doctorate, when he had to take a medical break, due to kidney problems that require him to get on the kidney machine; Jessie, II, [47 years old], works two jobs to take care of his family; and Stephen [40, years old], a former employee for the Nashville office of the U. S. Marshal's Office was inducted into the United States Martial Arts Hall of Fame in August of 2008 and now have at least three schools of his own, in Nashville, Tennessee.

At 67 years old, I am employed as an over the road driver with Western Express, in Nashville, TN and gone away from Nashville from two to three weeks at a time. At no time have the district court, or any of the attorneys of record agreed to have me conduct a deposition by telephone, in fact my request by telephone was rejected by the attorneys of record, in a conference call.

During my unemployment process, I lost my home and on several occasions I did not have access to a telephone to conduct a hearing if one had been granted.

During the flood in Nashville, all of my records with personal property were destroyed.

However, the final Order from the Court of Appeals raised the federal question involving Rule 4 of Fed. R.App. 2., that is being presented in this application since I have been denied a hearing on the merits in the district court and on the direct appeal, as well as the appointment of counsel.

Reasons why the writ should be granted

The magistrate judge, whom Petitioner objected to her being assigned to this case in the beginning, said in her R&R, Petition never filed a copy of the Second Amendment of Complaint with the court, or served on defendants, that the court had approved. How can the court approve an amendment that has never been filed with the court?

With respect to Universal Am-Can Ltd., Petitioner have no interest in that entity. In fact, I had no knowledge of its existence until one of the attorneys in the phone meeting, authorized by the magistrate judge, informed me of the new entity's role, and they later denied the entity's role in this lawsuit. These are the kind of individuals I have dealt with all of my life. They do not respect other men, nor do they fear God.

There are allegations in the Report and Recommendation of serving Orders on Petitioner that was never received, nor heard of until the Proposed Order was served and received at a date later than the date as shown on the Order and almost too late for Petitioner to respond, without obtaining the extension of time to file.

The Eighth Circuit Has Decided an Important Federal Question In A Way That Conflicts With Relevant Decisions Of This Court.

The Court of Appeals, in deciding that the appeal is not timely filed; or to dismiss without explanation, has denied Petitioner of a federal protected right to be heard, which foreclosed all chances to obtain relief, or even be heard. This Court should determine whether the failure to comply with Rule 4 of Fed. R. App. P. can bar a litigant from having his day in court when there are exceptional circumstances involved.

The Eighth Circuit Ignored Basic Elements of Due Process Established By This Court when It Dismissed the Direct Appeal Without Examination.

The Court of Appeal failed to examine the record to see that Petitioner made a request to the district judge for the appointment of counsel, since that court exercise that duty, when asked, but denied the same request to Petitioner. The record would have shown there were special circumstances involving the Petitioner's occupation as an over the road driver and not being in one place longer that two hours at most, making deliveries and not having access to a law library to conduct research, nor to U.S. Mail to be aware of matters that needed a response.

The Eighth Circuit 's Order Deprived Petitioner of Equal Protection Under The Law.

This Court has been asked on many occasions to express the minimum and the limited boundaries that affect "due process" and "equal protection". However, even though a Rule or Statute may be valid in their structure, they can also be invalid, depending on the circumstances in each situation. In the case at bar, all of the members of the bar in this case, knew that Petitioner did not have access to proper means, time, or the mail to receive and respond to time sensitive pleadings, nevertheless, sanctions were imposed because of Petitioners inability to respond.

This Court had the opportunity to consider matters that are related to the issues at bar in case, *Boddie v. Connecticut*, 401 U.S. 371 (1971), after considering other unrelated matters in this case ... this Court held, " a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question." *Id.* at 379. This Court further explained, due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons of judicial process must be given a " meaningful opportunity to be heard". *Id.* at 377. Further explanation revealed that, "Just as a generally valid notice procedure mail fail to satisfy due process because of the circumstances of the defendant, and the substantial issue being valid, may offend due process because it operates to foreclose a particular party's

opportunity to be heard." *Id.* at 380. Petitioner realize and understand that this decision is directed to states, but the federal courts are bound by the same rule of conduct as the state ... in fact, they must be held at a higher standard, simply because they are suppose to be an example to show how due process and equal protection must be applied.

This case has also shown judicial misconduct by two federal judges, in two different circuits, acting with malice and clearly resulted in their actions being a disgrace to the legal profession, and no less than common criminals, attempting to deprive and deny Petitioner of a fair hearing in a civil proceeding. Even though case, *Griffin v. Illinois,* 351 U.S. 12, 17 (1956), involve criminal law, this Court said, " there was no "meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance[Money not the issue at bar]. *Id.* at 18 and this principle has been applied in civil cases. See, *Lindsey*, 405 U.S. 56-92.

CONCLUSION

Because the Eighth Circuit Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court, the Writ should be granted. It is for the reasons that are stated herein that Petitioner is requesting this Court to GRANT other and further relief in this application for a Writ of Certiorari and hear this case de novo, and allow this case to proceed on briefs, and/or appoint counsel

and the time limit starts when the Petitioner signs for delivery;

Pursuant to Rule 8 of this Court Rules, issue sanctions against all of the individuals in this case, the Court deems to be involved in the bias, prejudice and judicial misconduct that is displayed in this case; and all other and further relief this Court deems proper; Including relief from the previous judgment from this Court, that singled me out for discrimination when no other individual had ever been subjected to such a judgment as that, which upset half of the members of this Court and there was no legal precedent that authorized this Court to take such actions, and this Court has the powers to act on its own motion to correct itself to restore the integrity of this Court; all other and further relief the court deems proper.

February 7, 2011

Jessie D. McDonald

Respectfully submitted,
/s/ Dr. Jessie D. McDonald
P.O. Box 280724
Nashville, TN 37228
(615) 970-0316

APP. 1

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 10-3152

Jessie D. McDonald

Plaintiff – Appellant

v.

Overnite Express, Inc,:
Quail Trucking, Ltd;
Transport Leasing Contract, Inc.

Defendant – Appelees

Appeal from U.S. District Court for the District of Minnesota-Minneapolis
(0:08-cv-05069-JNE)

JUDGMENT

The court has carefully reviewed the original file of the United States District Court and orders that this appeal be dismissed for lack of jurisdiction.

October 04, 2010

/s/ Michael E. Gans, Clerk

APP. 2.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

CASE NO: 08-CV-5069 (JNE/JSM)

JESSIE D. MCDONALD,

Plaintiff,

Vs.

OVERNITE EXPRESS, et. al., and
TRANSPORT LEASING CONTRACT, INC.,
Defendants.

FINAL ORDER

This case is before the Court on a Report and Recommendation issued by the Honorable Janie S. Mayeron, United States Magistrate Judge, on May 11, 2010. The magistrate judge recommended that Plaintiff's Motion for Summary Judgment be denie as moot, that the Motion to Dismiss and Further Motion for Sanctions of Overnite Express, Inc. andQuail Trucking, Ltd., be granted, that Plaintiff's Motion for Default Judgment be denied, and that Plaintiff's claims against Overnite Express and Quail Trucking be dismissed with prejudice. Plaintiff objected to the Report and Recommendation. The Court has conducted a de novo review of the record. *See* D. Minn. LR 72.2(b). Based on that review, the

Court adopts the Report and Recommendation.

Also before the Court is Plaintiff's e-mail request dated March 15, 2010, seeking permission to file a statement of poverty, rather than an affidavit, in support of his application to proceed on appeal in forma pauperis (IFP). Plaintiff was granted IFP status before the district court. Consequently,

Plaintiff may proceed on appeal IFP if and when Plaintiff files a timely notice of appeal with the Clerk of Court unless the Court "certifies that the appeal is not taken in good faith" or finds that Plaintiff is "not otherwise entitled to proceed in forma pauperis." *See* Fed. R. App. P. 24(a)(3)(A). Plaintiff's request to file a statement of poverty is therefore denied as moot.[2]

Based on the files, records, and proceedings herein, and for the reasons stated above, IT IS ORDERED THAT:

1. The May 11, 2010, Report and Recommendation [Docket No. 151] is ADOPTED.

2. Plaintiff's Motion for Summary Judgment [Docket No. 70] is DENIED AS MOOT.

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[2] Plaintiff attached a "Notice of Appeal" to the e-mail request. Plaintiff's March 15 Notice of Appeal was premature because final judgment had not been entered. *See* 28 U.S.C. §1291 (2006); *Huggins v. FedEx Ground Package Sys., Inc.*, 566 F. 3d 771, 773 (8th. Cir. 2009). Moreover, a notice of appeal must be filed with the Clerk of Court. *See* Fed. R. App. P. P. 3(a)(1) ("An appeal ... may be taken only by filing a notice of appeal with the district clerk.").

3. Overnite Express and Quail Trucking's Motion to Dismiss [Docket No. 123] is GRANTED.

4. Overnite Express and Quail Trucking's Further Motion for Sanctions [Docket No. 131] is GRANTED.

5. Plaintiff's Motion for Default Judgment [Docket No. 145] is DENIED.

6. Plaintiff's request to file a statement of poverty is DENIED AS MOOT.

7. Plaintiff's claims against Overnite Express and Quail Trucking are DISMISSED WITH PREJUDICE.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: July 9, 2010

s/ Joan N. Ericksen,
United States District Judge

APP. 5

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

JESSIE D. MCDONALD,
Plaintiff

v.

OVERNITE EXPRESS,
Defendants.

Civil No. 08-5069(JNE/JSM)

REPORT AND RECOMMENDATION

The above matter came on before the undersigned upon plaintiff's Motion for Summary Judgment [Docket No. 70]; defendants Overnite Express, Inc. and Quail Trucking, Ltd.'s Further Motion for Sanctions [Docket No. 131]; and plaintiff's Motion for Default Judgment [Docket No. 145]. This matter has been referred to the undersigned Magistrate Judge for a Report and Recommendation by the District Court pursuant to 28 U.S.C. § 636(b)(1)(A), (B) and Local Rule 72.1(c).

II. BACKGROUND

A. Plaintiff's Conduct Relating to the Complaint

The initial Complaint in this matter was filed by plaintiff Jessie D. McDonald ("McDonald") on September 2, 2008 asserting claims under Title VII and 42, U.S.C. §§ 1983, 1985, 1986. See Docket No. 1. Transport Leasing Contract, Inc.("TLC") and Overnite Express, Inc.("Overnite") were the only

captioned defendants, and McDonald alleged that Overnite was operating under the name of Quail Trucking.[3] See Complaint, ¶. Hereafter, Overnite and Quail Trucking are collectively referred to as "Overnite". TLC and Overnite moved to Dismiss the claims based on 42 U.S.C. §§ 1983, 1985, 1986; On June 18, 2009, this Court issued a Report and Recommendation [Docket No. 44] recommending the dismissal of these claims; Ericksen affirmed the Report and Recommendation and dismissed the claims with prejudice. [Docket No. 59].[4] On July 10, 2009, TLC moved to dismiss the only remaining claim against it – the Title VII claim; On September 24, 2009, this Court issued a Report and Recommendation [Docket No. 75] recommending Dismissal of this claim against TLC without

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[2] Complaint asserting the same claims against TLC and Overnite. See Amended Complaint [Docket No. 47].Prejudice, which was adopted by Judge Ericksen on October 26, 2009. [Docket No. 100].[5]

On October 26, 2009, while this Court's decision recommending dismissal of TLC was pending and before Judge Ericksen issued the Order

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[3] There is no evidence in the docket that an individual summons was issued with regards to the Complaint or the Amended Complaint as to Quail Trucking or that service was effectuated on Quail Trucking as an individual defendant.

adopting the Report and Recommendation, McDonald sought a motion to amend his complaint. See Docket No. 78. The proposed second amended complaint was dated September 7, 2009, and sought to assert claims under Title VII against Overnite Quail Trucking, TLC and Universal Am-Cam Ltd.

[3] On January 19, 2010, Judge Ericksen denied McDonald's request to file a motion for reconsideration from the Order that dismissed TLC from this action. See January 19, 2010 Order [Docket No. 140] See Docket No. 79. On November 5, 2009, this Court granted McDonald's motion to amend permitting him to amend his complaint as to Overnite, Quail Trucking, and Universal Am-Can Ltd.[6] See November 5, 2009 Order [Docket No. 109]. The Court Ordered McDonald to serve on Overniteand Quail Trucking and file with the Court the Second Amended Complaint approved by the Court on or before November 12, 2009. Id. The Court also Ordered McDonald to separately serve the second Amended complaint on Universal Am-Can Ltd. as Overnite's counsel represented that he did not represent Universal Am-Can. Id . On November 16, 2009, McDonald filed a Certificate of Service[Docket No. 114], stating that on November 11, 2009, he had served the Second Amended Complaint, dated September 7, 2009, on Overnite and Quail Trucking, and Universal Am-Can Ltd. By certified mail. McDonald did not file the Second Amended Complaint as ordered by the Court. At the

[6] As previously stated, TLC had already been dismissed on October 26, 2009.

November 20, 2009 hearing before the Court, counsel stated that the Second Amended Complaint attached to McDonald's motion at Docket No. 79 (dated September 7, 2009) and approved by the Court. The Court then issued another written order requiring McDonald to serve on Overnite, Quail Trucking, and Universal Am-Can Ltd., and file with the Court, the Second Amended Complaint dated September 7, 2009 that was the subject of his motion to amend [Docket No. 79] and approved by the Court. See November 25, 2009 Order [Docket No. 121] at p. 5.

As of the date of this Report and Recommendation, McDonald has not filed the Second Amended Complaint attached to his motion at Docket No. 79, nor is there any evidence in the record that McDonald has served this amended pleading on Overnite, Quail Trucking or Universal Am-Can Ltd.

B. Plaintiff's Conduct Relating to Discovery

On September 16, 2009, Overnite served its first Set of Interrogatories and First Request for Production of Documents on McDonald. See October 21, 2009 Affidavit of Michael L. McCain in support of Defendants' Motion to Compel [Docket No. 88], Exs. A, B. On September 25, 2009, McDonald served and filed a motion for summary judgment against TLC and Overnite [Docket No. 70].[7] On October 9, 2009,

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[7] After this motion was referred to this Court by Judge Ericksen [Docket No. 81], on October 8, 2009, this Court issued an order setting a briefing schedule for the motion [Docket No. 84].Thereafter, Overnite and TLC moved to extend the deadline for their response to this motion in light of the pending Report and Recommendation by this Court recommending dismissal of TLC from the suit and the outstanding discovery disputes

McDonald sent a letter to counsel for Overnite stating that he refused to answer this discovery.[8] Id.,

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between the parties regarding McDonald's refusal to respond to discovery or appear for his deposition. See Docket No. 94. The Court initially granted both TLC and Overnite's request [Docket No. 101] for an extension and then again extended the date by which Overnite was required to respond to McDonald's summary judgment motion until after he had fully and completely responded to the written discovery ordered answered by this Court and his deposition had occurred. See Docket No. 121 at p. 6. After this motion was referred to this Court by Judge Ericksen [Docket No. 81], on October 8, 2009, this Court issued an order setting a briefing schedule for the motion [Docket No. 84].Thereafter, Overnite and TLC moved to extend the deadline for their response to this motion in light of the pending Report and Recommendation by this Court recommending dismissal of TLC from the suit and the outstanding discovery disputes between the parties regarding McDonald's refusal to respond to discovery or appear for his deposition. See Docket No. 94. The Court initially granted both TLC and Overnite's request [Docket No. 101] for an extension and then again extended the date by which Overnite was required to respond to McDonald's summary judgment motion until after he had fully and completely responded to the written discovery ordered answered by this Court and his deposition had occurred. See Docket No. 121 at p. 6.

[8] The letter was also directed to counsel for TLC as the Order dismissing it from the suit had yet to be issued.

Ex. C. On October 16, 2009, Overnite served a Notice of Deposition on McDonald for October 27, 2009 at 9:30 a.m. at its lawyer's office in Minneapolis, Minnesota. Id., Ex. D. On October 19, 2009, during a telephone conference with counsel for Overnite and TLC, McDonald reiterated his refusal to respond to the propounded written discovery absent a Court Order, and his refusal to travel to Minnesota to his deposition, although he left the option of a telephonic deposition. Id., ¶¶ 7-8. Based on McDonald's refusal to respond to discovery until the Court intervened, the parties agreed to informally confer with the Court regarding these disputes that had been agreed to by the parties. Id., ¶ 9.

On October 21, 2009, Overnite served and filed a motion to compel [Docket No. 85], based on McDonald's failure to respond to written discovery and his refusal to present himself for his deposition.[9]

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[7] On the same day, October 21, 2009, McDonald served on counsel for TLC (but not Overnite) a Motion Presenting Discovery Dispute and Request for Telephonic Deposition. [Docket Nos. 102, 104, 106]. These pleadings were filed with the Court on October 26, 2009. See Docket Nos 102,106. No date was set for hearing on these matters. In these pleadings, McDonald requested an order from this Court limiting defendants' discovery to the issues in this lawsuit, and asking that his deposition be taken telephonically. On October 30, 2009, McDonald served on counsel for TLC and Overnite a

McDonald made no appearance at the November 4, 2009 hearing and never responded to Overnite's motion to compel. On November 5, 2009, this Court issued an Order continuing Overnite's motion to compel and McDonald's Motion Presenting Discovery Dispote until November 20, 2009. See November 5, 2009 Order [Docket No. 109]. The Court continuing these Motions in order to give McDonald "one last opportunity to file with the Court and serve on Overnite a substantive response to its Motion to Compel and to appear by telephone for hearing before the Court on **Friday November 20, 2009 at 11:00 a.m.**" Id . (emphasis in original). The Court also ordered McDonald to serve and file a written response to Defendants' Motion to Compel on or before November 16, 2009. Id. On November 16, 2009, McDonald filed with the Court the October 9, 2009 letter he had previously sent to counsel for TLC and Overnite, which stated that he was not going to respond to the propounded discovery because it did

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Request for Case Management Order [Docket No. 111] to determine the scope of interrogatories and depositions.

not address the issues in the Complaint.[10] See Docket No. 113. McDonald filed no substantive response to Overnite's Motion to Compel.

On November 20, 2009, the hearing on Overnite's continued motion to compel was held. McDonald did not appear in person or by telephone at the hearing. The Court proceeded to grant in part and deny in part Overnite's motion to compel as it related to the first Set of Interrogatories and First Request for Production of Documents. See November 25, 2009 Order [Docket No. 121]. The Court also provided in the Order that:

> Plaintiff shall provide answers to Interrogatories And documents responsive to Requests for Production, as ordered by the Court, on or before December 15, 2009. Failure by plaintiff to provide timely and complete responses to the discovery ordered may result in further sanctions being assessed against him, including but limited to, monetary sanctions and possible dismissal of his case.

Id. At p.4 (emphasis in original).

In addition, the Court denied McDonald's Request for Telephonic Deposition [Docket No. 104] and ordered that his deposition is "take place in Minnesota" and "be completed on or before January 10, 2010. Id. The Court cautioned that "[f]ailure by

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[10] This letter was already filed by Overnite as part of its Motion to Compel. See October 21, 2009 Affidavit of Michael L. McCain [Docket No. 88], Ex. C.

plaintiff to appear in person for his deposition may result in further sanctions being assessed against him, including but limited to, monetary sanctions being assessed against him, including but limited to monetary sanctions and possible dismissal of his case." Id. (emphasis added). Further, the Court ordered McDonald to pay to Overnite attorney's fees in the amount of $1850 incurred by it in connection with the November 4 and November 20 hearings on the motion to compel. Id. At pp. 4-5. The Court again warned McDonald that if he failed to comply with its Order and make payment of fees by December 15, 2009, "further sanctions [could be] assesses against him, including but limited to, monetary sanctions and possible dismissal of his case." Id. at p. 5. Finally, the Court ordered that Overnite was not required to serve and file its opposition papers to McDonald's Motion for Summary Judgment [Docket No. 70] until 30 days after McDonald "fully and completely" responded to the written discovery ordered by this Court and his deposition had occurred. Id. at p. 6.

On December 8, 2009, Overnite served McDonald with a Notice of Amended Deposition via regular mail to his post office box address, which scheduled his deposition for December 29, 2009, at the law offices of Overnite's lawyer in Minneapolis, Minnesota. See Affidavit of Michael L McCain in support of Defendants' Motion for Further Sanctions [Docket No. 134], ¶ 6. McDonald failed to appear at his December 29, 2009 deposition, and did not contact Overnite's counsel to reschedule the deposition. Id.,¶ 8.

On December 17, 2009, Overnite brought Motion to Dismiss under Rules 37(b) and 41(b) of the Federal Rules of Civil Procedure [Docket No. 123], arguing that McDonald's action against it should be dismissed due to his failure comply with this Court's November 5 and 20, 2009 Orders, by not filing and serving his Second Amended Complaint, and by failing to answer Overnite's discovery requests and deliver a check to its counsel in the amount of1850 by December 15, 2009, as ordered.[11]

On December 29, 2009, Overnite brought a Motion for Further Sanctions under Rule 37(b) [Docket No. 131]. In this motion, Overnite reiterated its position that McDonald's suit against it should be dismissed due to his failure to respond to its written discovery requests and his failure to issue a check to its counsel in the amount of $1850.00 as ordered by this Court on November 25, 2009. As an additional basis for dismissal, the motion also relied on McDonald's failure to appear at the December 29, 2009 deposition or contact counsel to reschedule the deposition, in violation of this Court's November 25, 2009 Order.

On January 4, 2010, McDonald filed his Answers to First Set of Interrogatories and Request for Documents. See, Docket No. 136.[12]

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[11] This Court notes that McDonald's December 23, 2009 Objections to Proposed Order [Docket N0. 129] misinterpreted Overnite's proposed order, which was part of his Motion to Dismiss, as an order from this Court granting the motion. See January 19, 2010 Order [Docket No. 140].

[12] In the preamble, McDonald stated "I do not have access to my mail and the means to meet the time sensitive deadlines

On January 19, 2010, this Court heard oral argument on Overnite's Motion for Further Sanctions. See Docket No. 141. McDonald did not submit any written response to this motion, nor did he appear at the hearing in person or by telephone. Id. Having received no written response from McDonald to Overnite's Motion to Dismiss and no written or oral communications from McDonald regarding his attendance at the hearing on the motion, on February 16, 2010, this Court cancelled the hearing and indicated that it would decide the motion on the written submissions. See Docket No. 142. On February 19, 2010, McDonald served a response to Overnite's Motion to Dismiss arguing that Overnite was not entitled to dismissal of his case because he answered their interrogatories and he had not refused to comply with any deposition requirements.[13] According to McDonald, he could not afford the expense of appearing for his deposition in Minnesota and he had offered to have his deposition taken by phone or in Nashville, Tennessee.

III. ANALYSIS

A. Defendants' Motions to Dismiss and For

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and request that the court do not hold to the strict schedule." See Docket No. 136.

[13] This pleading was never filed with the court.

Further Sanctions

Pursuant to Rules 37(b) and 41(b) of the Federal Rules of Civil Procedure, Overnite moved for dismissal of McDonald's action against it and for and award of attorney's fees against McDonald for his failure to comply with this Court's orders.[14]
Rule 37(b)(2)(A) provides for the following for a party's failure to obey an order to provide discovery:

(A) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

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[14] The Eighth Circuit has expressed its preference that noncompliance with discovery orders rely on Rule 37, rather than Rule 41. See *Sentis Group, Inc., Coral Group, Inc. v. Shell Oil Co.*, 559 F. 3d 888, 899-900 (8th. Cir. 2009). This Court acknowledges that Overnite also moved to dismiss on the basis that McDonald did not serve and file the Second Amended Complaint approved and ordered by the Court. Rule 41(b) provides in relevant part, "[f]or the failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or any claim against the defendant." As McDonald never served or filed the Second Amended Complaint approved by the Court, and the deadline to serve and file the pleading (December 10, 2010), has passed, McDonald is still prosecuting the action under the Amended Complaint [Docket No. 47], and thus, there is no basis to dismiss McDonald's action under Rule 41(b).

(i)Directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii)Prohibiting the disobedient party from supporting or opposing designated claims or Defenses, or from introducing designated claims or defenses, or from introducing designated matters in evidence;

(iii)Striking pleadings in whole or in part;

(iv)Staying further proceedings until the order is obeyed;

(v)Dismissing the action or proceeding in whole or in part;

(vi)Rendering a default judgment against the disobedient party; or

(vii)Treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

" To justify a sanction of dismissal, Rule 37 requires: '(1) an order compelling discovery, (2) a willful violation of that order, and (3) prejudice to the other party." *Sentis Group, Inc.*, 559 F. 3d at 899

(quoting *Schoffstall v. Henderson*, 223 F. 3d 818, 823 (8th. Cir 2000) (citation omitted)).[15] The discretion of a court to issue Rule 37 sanctions "is bounded by the requirement of Rule 37(b)(2) that the sanctions be 'just' and related to the claim at issue in order to provide discovery.'" *Hairston v. Alert Safety Light Products, Inc.*, 307 F. 3d 717, 719 (8th. Cir. 2002) (quoting *Avionic Co. v. General Dynamics Corp.*, 957 F. 2d 555, 558 (8th Cir 1992)). However, "'the district court's discretion narrows as the severity of the sanctions or remedy it elects increases.'" *Sentis Group*, 559 F. 3d at 888 (quoting *Werner v. Johnson*, 527 F.3d 687, 692 (8th Cir 2008). This is because the "sanction of dismissal is among the harshest of sanctions, and '[t]here is a strong policy favoring a trial on the merits and against depriving a party of his day in court.'" Id. (quoting *Fox v. Studebaker-Worthington, Inc.*, 516 F. 2d 989, 995-96 (8th Cir 1975)). "While the sanction of dismissal is 'drastic' and should therefore be used only in exceptional cases, *Allen v. Tobacco Superstore, Inc.*, 475 F. 3d 931, 936 (8th Cir. 2007) (quoting *Chrysler Corp. v. Carey*, 186 F. 3d 1016, 1019-20 (8th. Cir. 1999)), a district court is not required to impose the least onerous sanction so long as it considers whether a lesser sanction is available or appropriate, *Keefer v. Provident Life & Accident Ins. Co.*, 238 F. 3d 937, 941 (8th. Cir. 2000)." *Brennan v. Qwest Communications Intern, Inc.*, Civil No. 07-2024 (ADM/JSM), 2009 WL 1586721 AT *7 (D. Minn. June 4, 2009). "Rule 37 provides a sufficient,

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[15] At the time *Schoffstall* was decided, sanctions for failure to comply with a court order were reflected in Rule 37(b)(2)(c).

independent basis for dismissal of a complaint with prejudice." Id. at *15 (citing *Kabanuk v. City of Harris*, Civil No. 07-2119 (MJD/SRN), 2008 WL 314705 AT *3 (D. Minn. Feb. 04, 2008)); See also, *Hutchins v. A.G.Edwards & Sons*, 116 F. 3d 1256, 1260 (8th Cir. 1997).

This Court finds that dismissal of McDonald's action against Overnite is warranted. McDonald has a long history of not only ignoring his obligations as a litigant and the requirements of discovery, but the Order of this Court directing him to respond to Overnite's written discovery, appear at this deposition, and pay attorney's fees as a sanction. In short, every step of the way, McDonald has refused to cooperate, much comply, with his duties as a plaintiff who is seeking relief in this Court. First, McDonald refused to provide any responses to the written discovery served upon him by Overnite as required by the Federal Rules of Civil Procedure, and refused to appear in Minnesota for his scheduled deposition. He then agreed to address his disputes with this discovery informally with Overnite by a telephonic conference with the Court, but did not appear at the scheduled conference.

Second, when Overnite served him with a motion to compel responses to its written discovery, McDonald made no appearance at the hearing and filed no response to the motion. Instead of granting Overnite's motion at that time, the Court issued an Order on November 5, 2009, giving McDonald one last chance to serve and file a written response to Overnite's motion and to appear by telephone at the continued hearing on November 20, 2009. See

November 5, 2009 Order [Docket No. 109]. Again McDonald ignored the Order of the Court. He filed no substantive response to Overnite's motion as ordered by this Court, and he did not appear at the hearing on November 20, 2009. See November 5, 2009 Order [Docket No. 109]. Again McDonald ignored the Order of the Court. He filed no substantive response to Overnite's motion as ordered by this Court, and he did not appear at the hearing on November 20, 2009.

Following this hearing, this Court issued its November 25, 2009 Order requiring McDonald to provide answers to Overnite's interrogatories and responsive documents on or before December 15, 2009; to present himself for his deposition in Minnesota on or before January 10, 2010; and pay Overnite's $1850 (by December 15, 2009) in monetary sanctions arising out of the motion to compel. McDonald did not comply with any part of this Order. He never appeared at this deposition scheduled by Overnite for December 29, 2009; he never made arrangements to schedule the deposition prior to January 10, 2010; and he never paid Overnite the attorney's fees ordered by the Court. While McDonald ultimately did respond to Overnite's interrogatories and document requests, he did so nearly three weeks after they were due, and without consent of Overnite or an order of this Court extending the time for him to answer. [16] Finally, McDonald neither responded nor appeared

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[16] In his interrogatory answers, McDonald stated that he did not have access to his mail or the means to respond to the Court's time sensitive deadlines. See Answers to First Set of

Interrogatories [Docket No. 136]. The evidence in the record suggests to the contrary. The docket indicates that McDonald has objected to this Court's communications, as is evidenced by the fact that McDonald has objected to this Court's Report and Recommendations and appealed or sought relief from this Court's Orders on several occasions. See e.g., Docket Nos. 46, 82, 108, 129, 130. Further, McDonald was fully aware of Overnite's attempt to dismiss his action for his failure to abide by this Court's discovery order, as is evidenced by his objection to the proposed order submitted by Overnite regarding its motion to dismiss, that was dated six days after the filing of the motion. See Docket No. 129. In any event, the Court gave McDonald ample time to comply with its orders and McDonald made no request to the Court for an extension.

at Overnite's motion for sanctions, nor did he appear or make a timely response to Overnite's motion for dismissal. It was only after this Court cancelled the hearing on Overnite's motion to dismiss, that McDonald submitted written response in opposition to the motion arguing that the motion was moot because he had served his responses to written discovery, and he could not afford to come to Minnesota for his deposition

Given this record, the Court finds that McDonald has willfully violated this Court's November 25, 2009 Order regarding discovery and has deliberately and intentionally disregarded the duties he owes to this Court and Overnite as a litigant under the Federal Rules of Civil Procedure, as evident by his persistent failure to answer discovery requests directed to him, respond to motions filed against him, and comply with the Court's directives and orders.

With regards to prejudice, even assuming that McDonald's belated answers to Overnite's interrogatories were adequate (which Overnite disputes) and McDonald was truthful when he stated he had no responsive documents in his possession or control, this Court concludes that McDonald's refusal to submit himself to an in-person deposition in Minnesota is prejudicial to Overnite. McDonald sought an order requiring his deposition to take place by telephone, which this Court denied on November 25, 2009. Given this Court's Order requiring that his deposition be taken by January 10, 2010, and his failure to appear for the re-noticed deposition on December 29, 2009, failure to contact

Overnite's counsel to reschedule the deposition, or to make yourself available for an in-person deposition in Minnesota even after Overnite brought its motions for sanctions and for dismissal, this Court finds that it was and is McDonald' burden to McDonald, this is his action and he is obligated to prosecute his case and meet the requirements of a litigant, not to mention this Court's Orders. Without McDonald's deposition, Overnite was prevented from obtaining the evidence it needed to defend against this action, move for summary judgment or adequately prepare for trial. As such, this Court concludes that McDonald's willfully failure to abide by this Court's November 25, 2009 Order directing his deposition take place in Minnesota has prejudiced Overnite.

Finally, this Court has considered the possibility of imposing a less serious sanction than dismissal with prejudice, such as monetary sanctions or staying this case until McDonald obeys this Court's November 25, 2009 Order. However, McDonald has shown that warnings of sanctions and lesser sanctions do not motivate him to act, as is evidence by the fact that he still has not complied with the November 25, 2009 Order directing him to pay attorney's fees to Overnite in the amount of $1850. Moreover, his conduct overall suggests that he will not follow this Court's directives – he has ignored this Court's two Orders directing that he serve and file the Second Amended Complaint approved by Court -- and his failure to respond or appear at any of the motions brought by Overnite

leads this Court to conclude that he will not respond to other matters before this Court.

For all the reasons stated above, this Court recommends that McDonald's action against defendants Overnite and Quail Trucking be dismissed with prejudice. The Court will not order any additional monetary sanctions against McDonald, as the Court concludes that the dismissal with prejudice is a sufficient sanction.[17]

B. Plaintiff's Motion for Summary Judgment

McDonald's failure to provide responses to Overnite was not required to serve and file its opposition papers McDonald's Motion for Summary Judgment [Docket No. 70] until 30 days after McDonald "fully and completely" responded to the written discovery ordered by this Court and his deposition had occurred. See November 25, 2009 Order [Docket No. 121] at p. 5. As stated above. McDonald has not met the discovery obligations ordered by the Court. Therefore, given this Court's recommendation that his suit against Overnite be dismissed due to his failure to comply with the Court's discovery orders, this Court recommends that his pending Motion for Summary Judgment be denied as moot.

C. Motion for Default Judgment against Universal Am-Can Ltd.

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[17] This recommendation does not alleviate McDonald's obligation to pay Overnite the $1850 ordered by the Court on November 25, 2009.

McDonald has asked that this Court grant default judgment against Am-Can[18] for the monetary sum that he sought in amendments to his complaints. See Plaintiff's Memorandum of Law [Docket No. 147] at p. 6. In support of his motion, McDonald claimed:

> Overnite Express went into bankruptcy Reconstruction and was purchased by the Am-Can Transport entity and this Court Granted the Motion to Amend, to add the Am-Can Ltd. Entity and was served a copy of the pleadings and motions, and so far Am-Can Has failed or refused to submit an answer to Complaint, but wrote a letter to plaintiff Suggesting that the lawsuit be dropped, before the cost for the litigation and damages amount I would have difficult in paying.

Id. at p. 2. TLC responded to the motion for default judgment to clarify that it was not aware of any appeal to the Eighth Circuit of its dismissal from this action, as claimed by McDonald in his moving papers. See Docket No. 50. McDonald sent a Request

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[18] This Court assumes that the Universal Am-Can Ltd. That McDonald sought to add in his Second Amended Complaint [Docket No. 79] is the same as the "Am-Can" and the "Am-Can Transport entity" that is the subject of his motion for default judgment. See Notice and Accompanying Memorandum Law [Docket Nos. 146, 147].

Permission to Submit a Reply in support of his motion for default judgment with a reply memorandum, which the Court has considered as part of its recommendation.[19]

The Federal Rules of Civil Procedure provide that default or default judgment be entered against a party who "has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise." Fed. R. Civ. P. 55(a). A motion for default judgment must be preceded by an entry of default. See Fed. R. Civ. P. 55(a) and (b).

McDonald's motion fails. First, no motion has been previously brought by McDonald to find Universal Am-Can Ltd. In default, and no such determination has been made. See *Johnson v. Dayton Elec. Mfg. Co.*, 140 F. 3d 781 (8th Cir. 1998) ("When a party 'has failed to plead or otherwise defend' against a pleading listed in Rule 7(a), entry of default under Rule 55(a) must precede grant of a default judgment under Rule 55(b).").

Second, even if McDonald had properly stylized his motion as a motion to find Universal Am-Can Ltd. In default, there is nothing to indicate that its was properly served in this case so as to give this Court jurisdiction over Universal Am-Can Ltd.

On November 5, 2009, this Court granted McDonald's motion to amend to add Universal Am-Can Ltd [Docket No. 109] and on November 16,

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[19] McDonald has failed to file his Request Permission to Submit a Reply in support of his motion for default judgment or his reply memorandum as of the date of this Report and Recommendation.

2009, McDonald filed a Certificate of Service [Docket No. 114], stating that he had served the Second Amended Complaint dated September 7, 2009 on Universal Am-Can Ltd by certified mail. There is no indication that McDonald also served a summons on Universal Am-Can Ltd. See Fed. R. Civ. P. 4(c)(1)("A summons must be served with a copy of the complaint."). Service of the summons or not, mailing a copy of the Second Amended Complaint on the Universal Am-Can Ltd., as alleged by McDonald, without the return to him of the waiver/ acknowledgement of service forms from Universal Am-Can Ltd., does not constitute proper service of process.. Federal Rules of Civil Procedure 4(e)(1) provides that service in a federal district court may be effected pursuant to the laws of the state in which the court is located. Minnesota Rule of Civil Procedure 4.05 provides that service "may be made by mailing a copy of the summons and the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgement conforming substantially to Form 22 and a return envelope, postage prepaid, addressed to sender." Minnesota Rule 4.05 explicitly states that if acknowledgement of service is not received by the sender within twenty days, "service shall be ineffectual." See also Minn. R. Civ. P. 12.01 (requiring an answer to be filed within 20p days after service). Alternatively, Fed. R. Civ. P. 4(d)(1) allows a plaintiff to notify a defendant via the mail that an action has been commenced and request that the defendant waive the service of the summons. See Fed. R. Civ. P. 4(d)(1)(A)-(G). However, the plaintiff

must include with the notification a form for waiver of service of summons. See, e.g., Fed. R. Civ. P. Appx. Form 5 (Notice of Lawsuit and Request for Waiver of Summons); Form 6 (Waiver of Service Summons). The Eighth Circuit has held that the formal requirements of Minnesota Rule 4.05 anf Fed. R. Civ. P. 4(d)(2) must be met in order for service by mail to be effective. See *MW Ag, Inc. v. New Hampshire Ins. Co.*, 107 F. 3d 644, 646-47 (8th Cir. 1997); See also, *Gulley v. Mayo Foundation*, 886 F. 2d 161, 164-65 (8th Cir. 1989).

Therefore, even assuming that McDonald did send by mail a copy of the summons and the court-approved Second Amended Complaint to Universal Am-Can Ltd., his failure to provide any evidence that he received the required signed waiver or acknowledgement of service forms from Universal Am-Can Ltd. Renders ineffectual McDonald's attempted service of process.[20] As such, this Court cannot grant default judgment against Universal

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[20] This Court notes that actual notice to a defendant of a lawsuit does not excuse the burden of service on a plaintiff. See *Hinz v. Washington Mutual Home Loans,* No. 03-3206 (DWF/JGL), 2004 WL 729239 at *2 (D. Minn. April 2, 2004) (citing *Sieg v. Karens*, 693 F.2d 803, 807 (8tyh Cir. 1982).

Am-Can Ltd., as it does not presently have personal jurisdiction over it. See *Rogers v. Hartford Life & Accident Ins. Co.*, 176 F. 3d 933, 940 (5th Cir. 1999) ("When a district court lacks jurisdiction over a defendant because of improper service of process, the default judgment is void and must be set aside"); *Dennis Garberg* U Assocs. v. Pack Tech Intern. Corp., 115 F. 3d 767, 771 (10th Cir. 1997) ("We noted earlier that judgment by default should not be entered without a determination that the court has jurisdiction over the defendant.") (citations omitted); *Dedco, Inc. v. American Bonding Co.*, 7 F. 3d 1387, 1388 (8th. Cir. 1993) ("If a defendant is improperly

served, the court lacks jurisdiction over the defendant.") (8th Cir. 1963)).

RECOMMENDATION

For the reasons set forth above, it is recommended that:

1. Plaintiff's Motion for Summary Judgment [Docket No. 70] be DENIED as moot;
2. Defendants Overnite Express, Inc. and Quail Trucking , Ltd's Motion to Dismiss [Docket No. 123] be GRANTED;
2. Defendant Overnite Express, Inc. and Quail Trucking, Ltd.'s Further Motion for Sanctions [Docket No. 131] be GRANTED; and
3. Plaintiff's action against Overnite Express, Inc. and Quail Trucking, Ltd. Be DISMISSED WITH PREJUDICE.
4. Plaintiff's Motion for Default Judgment [Docket No. 145] be DENIED.

Dated: May 11, 2010

s/Janie S. Mayeron
JANIE S. MAYERON
United States Magistrate Judge

NOTICE

Under D. Minn. LR 72.2(b) any party may object to this Report and Recommendation by filing with the Clerk of Court, and serving all parties by May 25, 2010, a writing which specifically identies those portions of this Report to which objections are made and the basis of those objections. A party may respond to the objecting party's brief within ten days after service thereof. All briefs filed under this Rule shall be limited to 3500 words. A judge shall make a de novo determination of those portions to which objection is made. This Report and Recommendation does not constitute an order or judgment of the District Court, and it is therefore not appealable directly to the Circuit Court of Appeals.

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No. 10-1069

Supreme Court, U.S.
FILED
MAR 2 9 2011
OFFICE OF THE CLERK

In the Supreme Court of the United States

JESSIE D. MCDONALD,

Petitioner,

vs.

OVERNITE EXPRESS, INC., et al.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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March 29, 2011

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QUESTION PRESENTED

1. Whether the Eighth Circuit erred in dismissing the Petitioner's appeal for lack of jurisdiction after the Petitioner filed an untimely appeal?

CERTIFICATE OF CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29.6 the following is Respondents, Overnite Express, Inc. and Quail Trucking, Ltd.'s, Corporate Disclosure Statement.

Corporate Disclosure Statement

Overnite Express, Inc. and Quail Trucking, Ltd. do not have parent corporations. A publicly-held corporation does not own more than ten percent (10%) of Overnite Express, Inc. or Quail Trucking, Ltd.'s stock.

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BRIEF IN OPPOSITION

STATUTORY PROVISIONS INVOLVED

The Question involves the application of 28 U.S.C. §2107(a) which reads, "[e]xcept as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree."

The Question also involves the application of the Federal Rule of Appellate Procedure 4(a)(1)(A) which reads, "[i]n a civil case, except as provided by Rule 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered."

STATEMENT OF THE CASE

On May 11, 2010, Magistrate Judge Janie S. Mayeron issued a Report and Recommendation ("Report") dismissing Petitioner Jessie D. McDonald's ("McDonald") claims against Respondents, Overnite Express Inc. and Quail Trucking, Ltd. (collectively "Overnite") with prejudice. (Resp. App. 1-23).[1] On July, 9, 2010, the United States District Court for the District of Minnesota adopted Magistrate Judge Mayeron's Report and entered its judgment dismissing McDonald's claims with prejudice pursuant to Local Rule 72.2(b). (Resp. App. 24-28). Following the District Court's July 9, 2010 Order, McDonald filed a Motion to Amend the Judgment which the District Court denied on July 30, 2010. (Resp. App. 32-35). As such, McDonald's deadline to appeal was August 30, 2010, 30 days following the District Court's July 30, 2010 disposition of his motion to amend the judgment. *See* Fed. R. App. P. 4(a)(1)(A), 4(a)(4)(A)(iv). Nevertheless, McDonald filed a Notice of Appeal with the Eighth Circuit after the August 30th deadline. (Resp. App. 29-30). As a result, on October 4, 2010, the Eighth Circuit, after "carefully" reviewing the original file of the District

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[1] McDonald's Appendix contains numerous typographical and grammatical errors. In addition, McDonald misrepresents parts of the Report to the Court by both omitting language and adding language not in the Report. As such, Overnite has attached, for this Court's convenience, a true and correct courtesy copy of the May 11, 2010 Report and Recommendation (Resp. App. 1-23), July 9, 2010 District Court Order and Entry of Judgment dismissing the case (Resp. App. 24-28), and October 4, 2010 Eighth Circuit Order dismissing the appeal (Resp. App. 31).

Court, dismissed the appeal for lack of jurisdiction. (Resp. App. 31).

REASONS FOR DENYING THE WRIT

I. The Eighth Circuit's Decision Dismissing McDonald's Appeal For Lack Of Jurisdiction Does Not Warrant Review By This Court.

McDonald's Question does not warrant review because the Eighth Circuit's decision is consistent with 28 U.S.C. § 2107, the Federal Rules of Appellate Procedure and this Court's Decisions.

A. The Eighth Circuit's Decision Is Entirely Consistent With The Federal Rules of Appellate Procedure and This Court's Decisions.

This Court grants Petitions for Certiorari only for the compelling reasons set forth in Rule 10 of the Supreme Court Rules. McDonald's Petition does not satisfy any of these reasons. Indeed, the Eighth Circuit correctly dismissed his appeal for lack of jurisdiction. Based upon the Federal Rules of Appellate Procedure and this Court's decisions, no compelling reason exists to grant review of McDonald's Question.

In order to file a timely appeal with the Eighth Circuit, McDonald was required to file his appeal by August 30, 2010; thirty days after the District Court's July 30, 2010 Order. *See* Fed. R. App. P. 4(a)(1)(A),

4(a)(4)(A)(iv); 28 U.S.C. § 2107(a); *Needham v. White Lab., Inc.*, 454 U.S. 927, 929 (1981)(notice of appeal "*must* be filed within 30 days after the date of entry of the judgment or order appealed from")(emphasis added). McDonald missed the deadline to appeal the District Court's decision when he filed his untimely Notice of Appeal. (Resp. App. 29-30). As such, the Eighth Circuit correctly dismissed the appeal for lack of jurisdiction.

Because the thirty day period for filing an appeal is statutory under 28 U.S.C. § 2107, this Court has made clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement that must be met; it cannot be forfeited or waived. *Bowles v. Russell*, 551 U.S. 205, 213 (2007). The Court has ruled it cannot create equitable exceptions to this mandatory, jurisdiction requirement. *Id.* at 214. Further, the circuit courts have routinely dismissed untimely appeals for lack of jurisdiction even in the case of pro se litigants who file tardy notices of appeal. *See Silvia v. Laurie,* 594 F.2d 892 (1st Cir. 1979); *Jordan v. Verizon Corp.*, 391 Fed. Appx. 10 (2nd Cir. 2010)(unreported); *Thomas v. Chase Bank and Affiliates*, 2010 WL 4739645 (3rd Cir. 2010)(unreported); *Schafler v. HSBC Bank USA*, 381 Fed. Appx. 282 (4th Cir. 2010)(unreported); *Cheatam v. Blanda*, 2011 WL 493159 (5th Cir. 2011)(unreported); *Pryor v. R.C. Marshall*, 711 F.2d 63 (6th Cir. 1983); *U.S. ex rel Leonard v. O'Leary*, 788 F.2d 1238 (7th Cir. 1986); *Fuller v. Alliant Energy*, 2008 WL 2682612 (8th Cir. 2008)(unreported); *Schlenvogt v. Marshall*, 356 Fed. Appx. 955 (9th Cir. 2009)(unreported); *Kadonsky v. U.S.*, 221 Fed. Appx. 749 (10th Cir. 2007)(unreported); *Cordell v. Pacific*

Indemnity Co., 335 Fed. Appx. 956 (11th Cir. 2009)(unreported); *McCullough v. U.S.*, 236 Fed. Appx. (Fed. Cir. 2007)(unreported). As such, McDonald's appeal was untimely under both Federal Rule of Appellate Procedure 4(a)(1)(A) as well as unanimous case law applying the rule.

Finally, as this Court is well aware, McDonald is well versed in the legal process and is no stranger to this Court. In fact, he was the first pro se litigant to which this Court prospectively barred its doors. *In re McDonald*, 489 U.S. 180, 181 (1989). In issuing its 1989 opinion, the Court noted McDonald "had made 73 separate filings with the Court, not including this petition, which is his eighth so far this term. This includes 4 appeals, 33 petitions for certiorari, 99 petitions for extraordinary writs, 7 applications for stays and other injunctive relief." *Id.* As such, McDonald is no ordinary pro se litigant. Indeed, with the number of filings he has made with this Court alone, he is clearly intimately familiar with this Court's rules and corresponding deadlines. The Eighth Circuit correctly dismissed McDonald's untimely appeal.

CONCLUSION

For the foregoing reasons, McDonald's petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Case 0:08-cv-05069-JNE-JSM Document 151
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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

JESSIE D. MCDONALD, CIVIL NO. 08-5069 (JNE/JSM)

Plaintiff,

v. REPORT AND RECOMMENDATION

OVERNITE EXPRESS,

Defendants.

The above matter came on before the undersigned upon plaintiff's Motion for Summary Judgment [Docket No. 70]; defendants Overnite Express, Inc. and Quail Trucking, Ltd.'s Motion to Dismiss [Docket No. 123]; defendants Overnite Express, Inc. and Quail Trucking, Ltd.'s Further Motion for Sanctions [Docket No. 131]; and plaintiff's Motion for Default Judgment [Docket No. 145]. This matter has been referred to the undersigned Magistrate Judge for a Report and Recommendation by the District Court pursuant to 28 U.S.C. § 636(b)(1)(A), (B) and Local Rule 72.1(c).

I. BACKGROUND

A. Plaintiff's Conduct Relating to the Complaint

The initial Complaint in this matter was filed by plaintiff Jessie McDonald ("McDonald") on September 2, 2008 asserting claims under Title VII

and 42 U.S.C. §§ 1983, 1985, 1986. See Docket No. 1. Transport Leasing Contract, Inc. ("TLC") and Overnite Express, Inc. ("Overnite") were the only captioned defendants, and McDonald alleged that Overnite was operating under the name of Quail Trucking.[1] See Complaint, ¶ 1. Hereafter, Overnite and Quail Trucking are collectively referred to as "Overnite". TLC and Overnite moved to dismiss the claims based on 42 U.S.C. §§ 1983, 1985, 1986; on June 18, 2009, this Court issued a Report and Recommendation [Docket No. 44] recommending the dismissal of these claims; and on July 10, 2009, Federal District Judge Joan N. Ericksen affirmed the Report and Recommendation and dismissed the claims with prejudice. [Docket No. 59].[2] On July 10, 2009, TLC moved to dismiss the only remaining claim against it – the Title VII claim; on September 24, 2009, this Court issued a Report and Recommendation [Docket No. 75] recommending dismissal of this claim against TLC without prejudice, which was adopted by Judge Ericksen on October 26, 2009. [Docket No. 100].[3]

On October 2, 2009, while this Court's decision recommending dismissal of TLC was pending and

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[1] There is no evidence in the docket that an individual summons was issued with regards to the Complaint or the Amended Complaint as to Quail Trucking or that service was effectuated on Quail Trucking as an individual defendant.

[2] Prior to issuance of the Order dismissing the §§ 1983, 1985, 1986 claims with prejudice, McDonald filed an Amended Complaint asserting the same claims against TLC and Overnight. See Amended Complaint [Docket No. 47].

[3] On January 19, 2010, Judge Ericksen denied McDonald's request to file a motion for reconsideration from the Order that dismissed TLC from this action. See January 19, 2010 Order [Docket No. 140].

before Judge Ericksen issued the Order adopting the Report and Recommendation, McDonald brought a motion to amend his complaint. See Docket No. 78. The proposed second amended complaint was dated September 7, 2009, and sought to assert claims under Title VII against Overnite, Quail Trucking, TLC and Universal Am-Can Ltd. See Docket No. 79. On November 5, 2009, this Court granted McDonald's motion to amend permitting him to amend his complaint as to Overnite, Quail Trucking, and Universal Am-Can Ltd.[4] See November 5, 2009 Order [Docket No. 109]. The Court ordered McDonald to serve on Overnite and Quail Trucking and file with the Court the Second Amended Complaint approved by the Court on or before November 12, 2009. Id. The Court also ordered McDonald to separately serve the Second Amended Complaint on Universal Am-Can Ltd. as Overnite's counsel represented that he did not represent Universal Am-Cam. Id. On November 16, 2009, McDonald filed a Certificate of Service [Docket No. 114], stating that on November 11, 2009, he had served the Second Amended Complaint, dated September 7, 2009, on Overnite and Quail Trucking, and Universal Am-Can Ltd. by certified mail. McDonald did not file the Second Amended Complaint as ordered by the Court. At the November 20, 2009 hearing before the Court, counsel for Overnite stated that the Second Amended Complaint served upon him was not the Second Amended Complaint attached to McDonald's motion at Docket No. 79 (dated September 7, 2009) and approved by the Court. The Court then issued another written order requiring McDonald to serve on Overnite, Quail

[4] As previously stated, TLC had already been dismissed on October 26, 2009.

Trucking, and Universal Am-Can Ltd., and file with the Court, the Second Amended Complaint dated September 7, 2009 that was the subject of his motion to amend [Docket No. 79] and approved by the Court. See November 25, 2009 Order [Docket No. 121] at p. 5.

As of the date of this Report and Recommendation, McDonald has not filed the Second Amended Complaint attached to his motion at Docket No. 79, nor is there any evidence in the record that McDonald has served this amended pleading on Overnite, Quail Trucking or Universal Am-Can Ltd.

B. Plaintiff's Conduct Relating to Discovery

On September 16, 2009, Overnite served its First Set of Interrogatories and First Request for Production of Documents on McDonald. See October 21, 2009 Affidavit of Michael L. McCain in Support of Defendants' Motion to Compel [Docket No. 88], Exs. A, B. On September 25, 2009, McDonald served and filed a motion for summary judgment against TLC and Overnite [Docket No. 70].[5] On October 9, 2009,

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[5] After this motion was referred to this Court by Judge Ericksen [Docket No. 81], on October 8, 2009, this Court issued an order setting a briefing schedule for the motion [Docket No. 84]. Thereafter, Overnite and TLC moved to extend the deadline for their response to this motion in light of the pending Report and Recommendation by this Court recommending dismissal of TLC from the suit and the outstanding discovery disputes between the parties regarding McDonald's refusal to respond to discovery or appear for his deposition. See Docket No. 94 The Court initially granted both TLC and Overnite's request [Docket No. 101] for an extension and then again extended the date by which Overnite was required to respond to McDonald's summary judgment motion

McDonald sent a letter to counsel for Overnite stating that he refused to answer this discovery.[6] Id., Ex. C. On October 16, 2009, Overnite served a Notice of Deposition on McDonald for October 27, 2009 at 9:30 a.m. at its lawyer's law offices in Minneapolis, Minnesota. Id., Ex. D. On October 19, 2009, during a telephone conference with counsel for Overnite and TLC, McDonald reiterated his refusal to respond to the propounded written discovery absent a Court order, and his refusal to travel to Minnesota to his deposition, although he left open the option of a telephonic deposition. Id., ¶¶ 7-8. Based on McDonald's refusal to respond to discovery until the Court intervened, the parties agreed to informally confer with the Court regarding these disputes. Id., ¶ 9. Counsel for Overnite set up the informal telephone conference with the Court for October 20, 2009, and notified McDonald of the conference by email, voicemail and letter. Id. Ex. E. McDonald failed to appear or engage in the informal telephonic conference scheduled with the Court on the discovery disputes that had been agreed to by the parties. Id., ¶ 9.

On October 21, 2009, Overnite served and filed a motion to compel [Docket No. 85], based on McDonald's failure to respond to written discovery and his refusal to present himself for his deposition.[7]

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until after he had fully and completely responded to the written discovery ordered answered by this Court and his deposition had occurred. See Docket No. 121 at p. 6.

[6] The letter was also directed to counsel for TLC as the Order dismissing it from the suit had yet to be issued.

[7] On the same day, October 21, 2009, McDonald served on counsel for TLC (but not Overnite) a Motion Presenting Discovery Dispute and Request for Telephonic Deposition.

McDonald made no appearance at the November 4, 2009 hearing and never responded to Overnite's motion to compel.

On November 5, 2009, this Court issued an Order continuing Overnite's motion to compel and McDonald's Motion Presenting Discovery Dispute until November 20, 2009. See November 5, 2009 Order [Docket No. 109]. The Court continued these motions in order to give McDonald "one last opportunity to file with the Court and serve on Overnite a substantive response to its Motion to Compel and to appear by telephone for a hearing before the Court on **Friday November 20, 2009 at 11:00 a.m.**" Id. (emphasis in original). The Court also ordered McDonald to serve and file a written response to defendants' Motion to Compel on or before November 16, 2009. Id. On November 16, 2009, McDonald filed with the Court the October 9, 2009 letter he had previously sent to counsel for TLC and Overnite, which stated that he was not going to respond to the propounded discovery because it did not address the issues in the Complaint.[8] See Docket No. 113. McDonald filed no substantive response to Overnite's Motion to Compel.

[Docket Nos. 102, 104, 106]. These pleadings were filed with the Court on October 26, 2009. See Docket Nos. 102-106. No date was set for hearing on these matters. In these pleadings, McDonald requested an order from this Court limiting defendants' discovery to the issues in this lawsuit, and asking that his deposition be taken telephonically. On October 30, 2009, McDonald served on counsel for TLC and Overnite a Request for Case Management Order [Docket No. 111] to determine the scope of interrogatories and depositions.

[8] This letter was already filed by Overnite as part of its Motion to Compel. See October 21, 2009 Affidavit of Michael L. McCain [Docket No. 88], Ex. C.

On November 20, 2009, the hearing on Overnite's continued motion to compel was held. McDonald did not appear in person or by telephone at the hearing. The Court proceeded to grant in part and deny in part Overnite's motion to compel as it related to the First Set of Interrogatories and First Request for Production of Documents. See November 25, 2009 Order [Docket No. 121]. The Court also provided in the Order that:

> Plaintiff shall provide answers to interrogatories and documents responsive to Requests for Production, as ordered by the Court, on or before **December 15, 2009**. Failure by plaintiff to provide timely and complete responses to the discovery ordered may result in further sanctions being assessed against him, including but limited to, monetary sanctions and possible dismissal of his case.

Id. at p. 4 (emphasis in original).

In addition, the Court denied McDonald's Request for Telephonic Deposition [Docket No. 104] and ordered that his deposition is "take place in Minnesota" and "be completed on or before January 10, 2010. Id. The Court cautioned that "[f]ailure by plaintiff to appear in person for his deposition may result in further sanctions being assessed against him, including but limited to, monetary sanctions and possible dismissal of his case." Id. (emphasis added). Further, the Court ordered McDonald to pay to Overnite attorney's fees in the amount of $1850 incurred by it in connection with the November 4 and November 20 hearings on the motion to compel. Id. at

pp. 4-5. The Court again warned McDonald that if he failed to comply with its Order and make payment of the fees by December 15, 2009, "further sanctions [could be] assessed against him, including but limited to, monetary sanctions and possible dismissal of his case." Id. at p. 5 (emphasis added). Finally, the Court ordered that Overnite was not required to serve and file its opposition papers to McDonald's Motion for Summary Judgment [Docket No. 70] until 30 days after McDonald "fully and completely" responded to the written discovery ordered by this Court and his deposition had occurred. Id. at p. 6.

On December 8, 2009, Overnite served McDonald with a Notice of Amended Deposition via regular mail to his post office box address, which scheduled his deposition for December 29, 2009, at the law offices of Overnite's lawyer in Minneapolis, Minnesota. See Affidavit of Michael L. McCain in support of Defendants' Motion for Further Sanctions [Docket No. 134], ¶ 6. McDonald failed to appear at his December 29, 2009 deposition, and did not contact Overnite's counsel to reschedule the deposition. Id., ¶ 8.

On December 17, 2009, Overnite brought Motion to Dismiss under Rules 37(b) and 41(b) of the Federal Rules of Civil Procedure [Docket No. 123], arguing that McDonald's action against it should be dismissed due to his failure comply with this Court's November 5 and 25, 2009 Orders, by not filing and serving his Second Amended Complaint, and by failing to answer Overnite's discovery requests and deliver a check to its counsel in the amount of $1850 by December 15, 2009, as ordered.[9]

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[9] This Court notes that McDonald's December 23, 2009

On December 29, 2009, Overnite brought a Motion for Further Sanctions under Rule 37(b) [Docket No. 131]. In this motion, Overnite reiterated its position that McDonald's suit against it should be dismissed due to his failure to respond to its written discovery requests and his failure to issue a check to its counsel in the amount of $1850.00, as ordered by this Court on November 25, 2009. As an additional basis for dismissal, the motion also relied on McDonald's failure to appear at the December 29, 2009 deposition or contact counsel to reschedule the deposition, in violation of this Court's November 25, 2009 Order.

On January 4, 2010, McDonald filed his Answers to First Set of Interrogatories and Request for Documents. See Docket No. 136.[10]

On January 19, 2010, this Court heard oral argument on Overnite's Motion for Further Sanctions. See Docket No. 141. McDonald did not submit any written response to this motion, nor did he appear at the hearing in person or by telephone. Id. Having received no written response from McDonald to Overnite's Motion to Dismiss and no written or oral communications from McDonald regarding his attendance at the hearing on the motion, on February 16, 2010, this Court cancelled the hearing and indicated that it would decide the

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Objections to Proposed Order [Docket No. 129] misinterpreted Overnite's proposed order, which was part of its Motion to Dismiss, as an order from this Court granting the motion. See January 19, 2010 Order [Docket No. 140].

[10] In the preamble, McDonald stated "I do not have access to my mail and the means to meet the time sensitive deadlines and request that the court do not hold to the strict schedule." See Docket No. 136.

motion on the written submissions. See Docket No. 142. On February 19, 2010, McDonald served a response to Overnite's Motion to Dismiss arguing that Overnite was not entitled to dismissal of his case because he answered their interrogatories and he had not refused to comply with any deposition requirements.[11] According to McDonald, he could not afford the expense of appearing for his deposition in Minnesota and he had offered to have his deposition taken by phone or in Nashville, Tennessee.

II. ANALYSIS

A. Defendants' Motions to Dismiss and For Further Sanctions

Pursuant to Rules 37(b) and 41(b) of the Federal Rules of Civil Procedure, Overnite moved for dismissal of McDonald's action against it and for an award of attorney's fees against McDonald for his failure to comply with this Court's orders.[12]

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[11] This pleading was never filed with the court.

[12] The Eighth Circuit has expressed its preference that noncompliance with discovery orders rely on Rule 37, rather than Rule 41. See Sentis Group, Inc., Coral Group, Inc. v. Shell Oil Co., 559 F.3d 888, 899-900 (8th Cir. 2009). This Court acknowledges that Overnite also moved to dismiss on the basis that McDonald did not serve and file the Second Amended Complaint approved and ordered by the Court. Rule 41(b) provides in relevant part, "[f]or the failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or any claim against the defendant." As McDonald never served or filed the Second Amended Complaint approved by the Court, and the deadline to serve and file the pleading (December 10, 2010), has passed, McDonald is still prosecuting the action under the Amended Complaint [Docket No. 47], and thus, there is no basis to dismiss McDonald's action under Rule 41(b).

Rule 37(b)(2)(A) provides for the following for a party's failure to obey an order to provide discovery:

> (A) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent--or a witness designated under Rule 30(b)(6) or 31(a)(4)--fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:
>
> > (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
> >
> > (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
> >
> > (iii) striking pleadings in whole or in part;
> >
> > (iv) staying further proceedings until the order is obeyed;
> >
> > (v) dismissing the action or proceeding in whole or in part;
> >
> > (vi) rendering a default judgment against the disobedient party; or

> (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

"To justify a sanction of dismissal, Rule 37 requires: '(1) an order compelling discovery, (2) a willful violation of that order, and (3) prejudice to the other party.'" Sentis Group, Inc., 559 F.3d at 899 (quoting Schoffstall v. Henderson, 223 F.3d 818, 823 (8th Cir. 2000) (citation omitted)).[13] The discretion of a court to issue Rule 37 sanctions "'is bounded by the requirement of Rule 37(b)(2) that the sanction be 'just' and relate to the claim at issue in the order to provide discovery.'" Hairston v. Alert Safety Light Products, Inc., 307 F.3d 717, 719 (8th Cir. 2002) (quoting Avionic Co. v. General Dynamics Corp., 957 F.2d 555, 558 (8th Cir. 1992)). However, "'the district court's discretion narrows as the severity of the sanction or remedy it elects increases.'" Sentis Group, 559 F.3d at 888 (quoting Wegener v. Johnson, 527 F.3d 687, 692 (8th Cir. 2008). This is because the "sanction of dismissal is among the harshest of sanctions, and '[t]here is a strong policy favoring a trial on the merits and against depriving a party of his day in court.'" Id. (quoting Fox v. Studebaker-Worthington, Inc., 516 F.2d 989, 995-96 (8th Cir. 1975)). "While the sanction of dismissal is 'drastic' and should therefore be used only in exceptional cases, Allen v. Tobacco Superstore, Inc., 475 F.3d 931, 936 (8th Cir. 2007) (quoting Chrysler Corp. v. Carey, 186 F.3d 1016, 1019-20 (8th Cir. 1999)), a district court is not required to impose the least onerous

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[13] At the time Schoffstall was decided, sanctions for failure to comply with a court order were reflected in Rule 37(b)(2)(C).

sanction so long as it considers whether a lesser sanction is available or appropriate, Keefer v. Provident Life & Accident Ins. Co., 238 F.3d 937, 941 (8th Cir. 2000)." Brennan v. Qwest Communications Intern., Inc., Civil No. 07-2024 (ADM/JSM), 2009 WL 1586721 at *7 (D. Minn. June 4, 2009). "Rule 37 provides a sufficient, independent basis for dismissal of a complaint with prejudice." Id. at *15 (citing Kabanuk v. City of Harris, Civil No. 07-2119 (MJD/SRN), 2008 WL 314705 at *3 (D. Minn. Feb. 04, 2008)); see also Hutchins v. A.G. Edwards & Sons, 116 F.3d 1256, 1260 (8th Cir. 1997).

This Court finds that dismissal of McDonald's action against Overnite is warranted. McDonald has a long history of not only ignoring his obligations as a litigant and the requirements of discovery, but the Order of this Court directing him to respond to Overnite's written discovery, appear at this deposition, and pay attorney's fees as a sanction. In short, every step of the way, McDonald has refused to cooperate, much comply, with his duties as a plaintiff who is seeking relief in this Court. First, McDonald refused to provide any response to the written discovery served upon him by Overnite as required by the Federal Rules of Civil Procedure, and refused to appear in Minnesota for his scheduled deposition. He then agreed to address his disputes with this discovery informally with Overnite by a telephonic conference with the Court, but did not appear at the scheduled conference.

Second, when Overnite served him with a motion to compel responses to its written discovery, McDonald made no appearance at the hearing and filed no response to the motion. Instead of granting Overnite's motion at that time, the Court issued an

Order on November 5, 2009, giving McDonald one last chance to serve and file a written response to Overnite's motion and to appear by telephone at the continued hearing on November 20, 2009. See November 5, 2009 Order [Docket No. 109]. Again McDonald ignored the Order of the Court. He filed no substantive response to Overnite's motion as ordered by this Court, and he did not appear at the hearing on November 20, 2009.

Following this hearing, this Court issued its November 25, 2009 Order requiring McDonald to provide answers to Overnite's interrogatories and responsive documents on or before December 15, 2009; to present himself for his deposition in Minnesota on or before January 10, 2010; and to pay Overnite's $1850 (by December 15, 2009) in monetary sanctions arising out of the motion to compel. McDonald did not comply with any part of this Order. He never appeared at this deposition scheduled by Overnite for December 29, 2009; he never made arrangements to schedule the deposition prior to January 10, 2010; and he never paid Overnite the attorney's fees ordered by the Court. While McDonald ultimately did respond to Overnite's interrogatories and document requests, he did so nearly three weeks after they were due, and without consent of Overnite or an order of this Court extending the time for him to answer.[14]

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[14] In his interrogatory answers, McDonald stated that he did not have access to his mail or the means to respond to the Court's time sensitive deadlines. See Answers to First Set of Interrogatories [Docket No. 136]. The evidence in the record suggests to the contrary. The docket indicates that McDonald has received this Court's communications, as is evidenced by the fact that McDonald has objected to this Court's

Finally, McDonald neither responded nor appeared at Overnite's motion for sanctions, nor did he appear or make a timely response to Overnite's motion for dismissal. It was only after this Court cancelled the hearing on Overnite's motion to dismiss, that McDonald submitted a written response in opposition to the motion arguing that the motion was moot because he had served his responses to written discovery, and he could not afford to come to Minnesota for his deposition.

Given this record, the Court finds that McDonald has willfully violated this Court's November 25, 2009 Order regarding discovery and has deliberately and intentionally disregarded the duties he owes to this Court and Overnite as a litigant under the Federal Rules of Civil Procedure, as evidenced by his persistent failure to answer discovery requests directed to him, respond to motions filed against him, and comply with the Court's directives and orders.

With regards to prejudice, even assuming that McDonald's belated answers to Overnite's interrogatories were adequate (which Overnite disputes) and McDonald was truthful when he stated he had no responsive documents in his possession or

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Report and Recommendations and appealed or sought relief from this Court's Orders on several occasions. See e.g., Docket Nos. 46, 82, 108, 129, 130. Further, McDonald was fully aware of Overnite's attempt to dismiss his action for his failure to abide by this Court's discovery order, as is evidenced by his objection to the proposed order submitted by Overnite regarding its motion to dismiss, that was dated six days after the filing of the motion. See Docket No. 129. In any event, the Court gave McDonald ample time to comply with its orders and McDonald made no request to the Court for an extension.

control, this Court concludes that McDonald's refusal to submit himself to an in-person deposition in Minnesota is prejudicial to Overnite. McDonald sought an order requiring his deposition to take place by telephone, which this Court denied on November 25, 2009. Given this Court's Order requiring that his deposition be taken by January 10, 2010, and his failure to appear for the re-noticed deposition on December 29, 2009, failure to contact Overnite's counsel to reschedule the deposition, or to make himself available for an in-person deposition in Minnesota even after Overnite brought its motions for sanctions and for dismissal, this Court finds that it was and is McDonald's intention to never travel to Minnesota to have his deposition taken. While a deposition in Minnesota may amount to an inconvenience or financial burden to McDonald, this is his action and he is obligated to prosecute his case and meet the requirements of a litigant, not to mention this Court's Orders. Without McDonald's deposition, Overnite was prevented from obtaining the evidence it needed to defend against this action, move for summary judgment or adequately prepare for trial. As such, this Court concludes that McDonald's willful failure to abide by this Court's November 25, 2009 Order directing his deposition take place in Minnesota has prejudiced Overnite.

Finally, this Court has considered the possibility of imposing a less serious sanction than dismissal with prejudice, such as monetary sanctions or staying this case until McDonald obeys this Court's November 25, 2009 Order. However, McDonald has shown that warnings of sanctions and lesser sanctions do not motivate him to act, as is evidenced by the fact that he still has not complied with the

November 25, 2009 Order directing him to pay attorney's fees to Overnight in the amount of $1850. Moreover, his conduct overall suggests that he will not follow this Court's directives – he has ignored this Court's two Orders directing that he serve and file the Second Amended Complaint approved by Court – and his failure to respond or appear at any of the motions brought by Overnight leads this Court to conclude that he will not respond to other matters before this Court.

For all the reasons stated above, this Court recommends that McDonald's action against defendants Overnite and Quail Trucking be dismissed with prejudice. The Court will not order any additional monetary sanctions against McDonald, as the Court concludes that the dismissal with prejudice is a sufficient sanction.[15]

B. Plaintiff's Motion for Summary Judgment

McDonald's failure to provide responses to Overnite's discovery lead to an order by the Court that Overnite was not required to serve and file its opposition papers to McDonald's Motion for Summary Judgment [Docket No. 70] until 30 days after McDonald "fully and completely" responded to the written discovery ordered by this Court and his deposition had occurred. See November 25, 2009 Order [Docket No. 121] at p. 5. As stated above, McDonald has not meet the discovery obligations ordered by the Court. Therefore, given this Court's recommendation that his suit against Overnite be

[15] This recommendation does not alleviate McDonald's obligation to pay to Overnite the $1850 ordered by the Court on November 25, 2009.

dismissed due to his failure to comply with the Court's discovery orders, this Court recommends that his pending Motion for Summary Judgment be denied as moot.

C. Motion for Default Judgment against Universal Am-Can Ltd.

McDonald has asked that this Court grant default judgment against Am-Can[16] for the monetary sum that he sought in amendments to his complaints. See Plaintiff's Memorandum of Law [Docket No. 147] at p. 6. In support of his motion, McDonald claimed:

> Overnite Express went into bankruptcy reconstruction and was purchased by the Am-Can Transport entity and this Court granted the Motion to Amend, to add the Am-Can Ltd. entity and was served with a copy of all pleadings and motions, and so far Am-Cam has failed or refused submit an answer to the complaint, but wrote a letter to plaintiff suggesting that the lawsuit be dropped, before the cost for the litigation and damages amount to amount I would have difficult in paying.

Id. at p. 2. TLC responded to the motion for default judgment to clarify that it was not aware of any

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[16] This Court assumes that the Universal Am-Can Ltd. that McDonald sought to add in his Second Amended Complaint [Docket No. 79] is the same as the "Am-Can" and the "Am-Can Transport entity" that is the subject of his motion for default judgment. See Notice of Motion and Accompanying Memorandum Law [Docket Nos. 146, 147].

appeal to the Eighth Circuit of its dismissal from this action, as claimed by McDonald in his moving papers. See Docket No 149. Overnite responded to the motion for default judgment by claiming that it has not filed for bankruptcy, it had not been purchased by Universal Am-Can Ltd. and McDonald has failed to provide any proof that he served it, TLC or Universal Am-Can Ltd. with his Second Amended Complaint. See Docket No. 50. McDonald sent a Request Permission to Submit a Reply in support of his motion for default judgment with a reply memorandum, which the Court has considered as part of its recommendation.[17]

The Federal Rules of Civil Procedure provide that default or default judgment may be entered against a party who "has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise." Fed. R. Civ. P. 55(a). A motion for default judgment must be preceded by an entry of default. See Fed. R. Civ. P. 55(a) and (b).

MacDonald's motion fails. First, no motion has been previously brought by McDonald to find Universal Am-Can Ltd. in default, and no such determination has been made. See Johnson v. Dayton Elec. Mfg. Co., 140 F.3d 781, 783 (8th Cir. 1998) ("When a party 'has failed to plead or otherwise defend' against a pleading listed in Rule 7(a), entry of default under Rule 55(a) must precede grant of a default judgment under Rule 55(b).").

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[17] McDonald has failed to file his Request Permission to Submit a Reply in support of his motion for default judgment or his reply memorandum as of the date of this Report and Recommendation.

Second, even if McDonald had properly stylized his motion as a motion to find Universal Am-Can Ltd. in default, there is nothing to indicate that its was properly served in this case so as to give this Court jurisdiction over Universal Am-Can Ltd.

On November 5, 2009, this Court granted McDonald's motion to amend to add Universal Am-Can Ltd. [Docket No. 109] and on November 16, 2009, McDonald filed a Certificate of Service [Docket No. 114], stating that he had served the Second Amended Complaint dated September 7, 2009 on Universal Am-Can Ltd by certified mail. There is no indication that McDonald also served a summons on Universal Am-Can Ltd. See Fed. R. Civ. P. 4(c)(1) ("A summons must be served with a copy of the complaint."). Service of the summons or not, mailing a copy of the Second Amended Complaint on the Universal Am-Can Ltd., as alleged by McDonald, without return to him of the waiver/acknowledgement of service forms from Universal Am-Can Ltd., does not constitute proper service of process. Federal Rule of Civil Procedure 4(e)(1) provides that service in a federal district court may be effected pursuant to the laws of the state in which the court is located. Minnesota Rule of Civil Procedure 4.05 provides that service "may be made by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to Form 22 and a return envelope, postage prepaid, addressed to the sender." Minnesota Rule 4.05 explicitly states that if acknowledgment of service is not received by the sender within twenty days, "service shall be ineffectual." See also Minn. R. Civ. P. 12.01 (requiring an answer to be filed within

20 days after service). Alternatively, Fed. R. Civ. P. 4(d)(1) allows a plaintiff to notify a defendant via the mail that an action has been commenced and request that the defendant waive the service of the summons. See Fed. R. Civ. P. 4(d)(1)(A)-(G). However, the plaintiff must include with the notification a form for waiver of service of summons. See, e.g., Fed. R. Civ. P. Appx. Form 5 (Notice of Lawsuit and Request for Waiver of Service of Summons); Form 6 (Waiver of Service of Summons). The Eighth Circuit has held that the formal requirements of Minnesota Rule 4.05 and Fed. R. Civ. P. 4(d)(2) must be met in order for service by mail to be effective. See MW Ag, Inc. v. New Hampshire Ins. Co., 107 F.3d 644, 646-47 (8th Cir. 1997); see also Gulley v. Mayo Foundation, 886 F.2d 161, 164-65 (8th Cir. 1989).

Therefore, even assuming that McDonald did send by mail a copy of the summons and the court-approved Second Amended Complaint to Universal Am-Can Ltd., his failure to provide any evidence that he received the required signed waiver or acknowledgment of service forms from Universal Am-Can Ltd. renders ineffectual McDonald's attempted service of process.[18] As such, this Court cannot grant default judgment against Universal Am-Can Ltd., as it does not presently have personal jurisdiction over it. See Rogers v. Hartford Life & Accident Ins. Co., 167 F.3d 933, 940 (5th Cir. 1999) ("When a district court lacks jurisdiction over a defendant because of improper service of process, the default judgment is

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[18] This Court notes that actual notice to a defendant of a lawsuit does not excuse the burden of service on a plaintiff. See Hinz v. Washington Mutual Home Loans, No. 03-3203 (DWF/JGL), 2004 WL 729239 at *2 (D. Minn. April 2, 2004) (citing Sieg v. Karens, 693 F.2d 803, 807 (8th Cir. 1982)).

void and must be set aside"); Dennis Garberg U Assocs. v. Pack Tech Intern. Corp., 115 F.3d 767, 771 (10th Cir. 1997) ("We have noted earlier that judgment by default should not be entered without a determination that the court has jurisdiction over the defendant.") (citations omitted); Dedco, Inc., v. American Bonding Co., 7 F.3d 1387, 1388 (8th Cir. 1993) ("If a defendant is improperly served, the court lacks jurisdiction over the defendant.") (citing Cohen v. Newsweek, Inc., 312 F.2d 76, 77-78 (8th Cir. 1963)).

RECOMMENDATION

For the reasons set forth above, it is recommended that:

1. Plaintiff's Motion for Summary Judgment [Docket No. 70] be **DENIED** as moot;

2. Defendants Overnite Express, Inc. and Quail Trucking, Ltd.'s Motion to Dismiss [Docket No. 123] be **GRANTED**;

3. Defendants Overnite Express, Inc. and Quail Trucking, Ltd.'s Further Motion for Sanctions [Docket No. 131] be **GRANTED**; and

4. Plaintiff's action against Overnite Express, Inc. and Quail Trucking, Ltd. be **DISMISSED WITH PREJUDICE**.

5. Plaintiff's Motion for Default Judgment [Docket No. 145] be **DENIED**.

Dated: May 11, 2010

s/ Janie S. Wayeron
JANIE S. MAYERON
United States Magistrate Judge

NOTICE

Under D.Minn. LR 72.2(b) any party may object to this Report and Recommendation by filing with the Clerk of Court, and serving all parties by **May 25, 2010**, a writing which specifically identifies those portions of this Report to which objections are made and the basis of those objections. A party may respond to the objecting party's brief within ten days after service thereof. All briefs filed under this Rules shall be limited to 3500 words. A judge shall make a de novo determination of those portions to which objection is made. This Report and Recommendation does not constitute an order or judgment of the District Court, and it is therefore not appealable directly to the Circuit Court of Appeals.

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Jessie D. McDonald,

Plaintiff,

v. Civil No. 08-5069 (JNE/JSM)
ORDER

Overnite Express, Inc.,
Quail Trucking, Ltd., and
Transport Leasing Contract, Inc.,

Defendants.

This case is before the Court on a Report and Recommendation issued by the Honorable Janie S. Mayeron, United States Magistrate Judge, on May 11, 2010. The magistrate judge recommended that Plaintiff's Motion for Summary Judgment be denied as moot, that the Motion to Dismiss and Further Motion for Sanctions of Overnite Express, Inc., and Quail Trucking, Ltd., be granted, that Plaintiff's Motion for Default Judgment be denied, and that Plaintiff's claims against Overnite Express and Quail Trucking be dismissed with prejudice. Plaintiff objected to the Report and Recommendation. The Court has conducted a de novo review of the record. *See* D. Minn. LR 72.2(b). Based on that review, the Court adopts the Report and Recommendation.

Also before the Court is Plaintiff's e-mail request dated March 15, 2010, seeking permission to file a statement of poverty, rather than an affidavit, in support of his application to proceed on appeal in

forma pauperis (IFP). Plaintiff was granted IFP status before the district court. Consequently, Plaintiff may proceed on appeal IFP if and when Plaintiff files a timely notice of appeal with the Clerk of Court unless the Court "certifies that the appeal is not taken in good faith" or finds that Plaintiff is "not otherwise entitled to proceed in forma pauperis." *See* Fed. R. App. P. 24(a)(3)(A). Plaintiff's request to file a statement of poverty is therefore denied as moot.[1]

Based on the files, records, and proceedings herein, and for the reasons stated above, IT IS ORDERED THAT:

1. The May 11, 2010, Report and Recommendation [Docket No. 151] is ADOPTED.
2. Plaintiff's Motion for Summary Judgment [Docket No. 70] is DENIED AS MOOT.
3. Overnite Express and Quail Trucking's Motion to Dismiss [Docket No. 123] is GRANTED.
4. Overnite Express and Quail Trucking's Further Motion for Sanctions [Docket No. 131] is GRANTED.
5. Plaintiff's Motion for Default Judgment

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[1] Plaintiff attached a "Notice of Appeal" to the e-mail request. Plaintiff's March 15 Notice of Appeal was premature because final judgment had not yet been entered. *See* 28 U.S.C. § 1291 (2006); *Huggins v. FedEx Ground Package Sys., Inc.*, 566 F.3d 771, 773 (8th Cir. 2009). Moreover, a notice of appeal must be filed with the Clerk of Court. *See* Fed. R. App. P. 3(a)(1) ("An appeal . . . may be taken only by filing a notice of appeal with the district clerk.").

[Docket No. 145] is DENIED.

6. Plaintiff's request to file a statement of poverty is DENIED AS MOOT.

7. Plaintiff's claims against Overnite Express and Quail Trucking are DISMISSED WITH PREJUDICE.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: July 9, 2010

s/ Joan N. Ericksen

JOAN N. ERICKSEN
United States District Judge

Case 0:08-cv-05069-JNE-JSM Document 159
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UNITED STATES DISTRICT COURT
District of Minnesota

Jessie D. McDonald

JUDGMENT IN A CIVIL CASE

V. Case Number: 08-cv-5069 (JNE/JSM)

Overnight Express, Inc.;
Quail Trucking, Ltd; and
Transport Leasing Contract, Inc.

___ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT:

1. The May 11, 2010, Report and Recommendation [Docket No. 151] is ADOPTED.

2. Plaintiff's Motion for Summary Judgment [Docket No. 70] is DENIED AS MOOT.

3. Overnite Express and Quail Trucking's Motion to Dismiss [Docket No. 123] is GRANTED.

4. Overnite Express and Quail Trucking's

Further Motion for Sanctions [Docket No. 131] is GRANTED..

5. Plaintiff's Motion for Default Judgment [Docket No. 145] is DENIED.

6. Plaintiff's request to file a statement of poverty is DENIED AS MOOT.

7. Plaintiff's claims against Overnite Express and Quail Trucking are DISMISSED WITH PREJUDICE.

July 9, 2010 RICHARD D. SLETTEN, CLERK

s/ L. Brennan

(By) L. Brennan Deputy Clerk

Case 0:08-cv-05069-JNE-JSM Document 165
Filed 09/02/10 Page 1 of 2

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

JESSIE D. MCDONALD,

Plaintiff,

v. Civil No. 08-5069 (JNE/JSM)

OVERNIGHT EXPRESS, ET AL.,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that Jessie D. McDonald, Pro se, Plaintiffs in the above named case, hereby appeal to the United States Court of Appeals for the Eighth Circuit from the final judgment from an order dismissing the complaint and order issuing sanctions against me, entered in this action on, or near the 30th, day of July, 2010.

s/_____
Dr. Jessie D. McDonald, Ph. D
drmack.usli@yahoo.com
P.O. Box 280724
Nashville, TN 37228

Certificate of Service

A copy of this Notice was served upon all counsel of record, by sending a copy through their email address as previously served, and a copy to the Magistrate Judge and U.S. District Judge.

A signed copy was mailed to the Office of the Clerk of the District Court, with the required filing fee of $455.00 and mailed to:

U.S. District Court
United States Courthouse
300 South Fourth Street, Suite 202
Minneapolis, MN 55415

And a copy mailed to:

Office of the Clerk
U.S. Court of Appeals for the Eighth Circuit
Warren E. Burger Federal Building
316 North Robert Street, Room 500
St. Paul, MN 55101

On this 30th, day of August, 2010, with the proper first class postage affixed thereon.

s/
Dr. Jessie D. McDonald

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Filed 10/04/10 Page 1 of 1

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 10-3152

Jessie D. McDonald

Plaintiff - Appellant

v.

Overnight Express, Inc.;
Quail Trucking, Ltd;
Transport Leasing Contract, Inc.

Defendants - Appellees

Appeal from U.S. District Court for the District of
Minnesota - Minneapolis
(0:08-cv-05069-JNE)

JUDGMENT

The court has carefully reviewed the original file of the United States District Court and orders that this appeal be dismissed for lack of jurisdiction.

October 04, 2010

Orderd Entered at the Direction of the Court:
Clerk, U.S. District Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Case 0:08-cv-05069-JNE-JSM Document 164
Filed 07/30/10 Page 1 of 3

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Jessie D. McDonald,

Plaintiff,

v. Civil No. 08-5069 (JNE/JSM)
ORDER

Overnite Express, Inc.,
Quail Trucking, Ltd., and
Transport Leasing Contract, Inc.,

Defendants.

The case is before the Court on the motion of Jessie D. McDonald to alter or amend judgment under Rule 59(e) of the Federal Rules of Civil Procedure.[1] On November 25, 2009, the magistrate judge warned McDonald that failure to comply with the Court's Orders could result in the sanction of dismissal. In a Report and Recommendation (R&R) dated May 11, 2010, the magistrate judge recommended dismissal of this action as a sanction for McDonald's "persistent failure to answer discovery requests directed to him, respond to motions filed against him, and comply with the Court's directives and orders." The May 11 R&R considered and rejected McDonald's argument that his employment as an over-the-road driver prevented

[1] McDonald requested permission to file a reply memorandum in support of his Rule 59(e) motion and attached a copy of the proposed reply to his request. The request is granted. The Court has considered the reply memorandum in deciding this motion.

him from timely responding to discovery and the Court's Orders. On July 9, 2010, the Court adopted the May 11 R&R and dismissed this action. Judgment was entered on the same day.

McDonald now asserts that the judgment should be amended because the Court was biased against him. "Rule 59(e) motions serve the limited function of correcting manifest errors of law or fact or to present newly discovered evidence." *United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 933 (8th Cir. 2006) (quotation marks omitted). McDonald claims the Court was biased because it ignored his inability to timely respond to discovery and the Court's Orders. The Court has already determined that McDonald was able to timely respond and nothing in the affidavit submitted by McDonald in support of his Rule 59(e) motion indicates that determination was in error. McDonald may not relitigate this issue in a Rule 59(e) motion. *See Michael Linet, Inc. v. Village of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005) ("[Plaintiff] cannot use a Rule 59(e) motion to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment."); *Dale & Selby Superette & Deli v. Dep't of Agric.*, 838 F. Supp. 1346, 1348 (D. Minn. 1993) (stating that a Rule 59(e) motion should not "be employed to introduce evidence that was available at trial but was not proffered, to relitigate old issues, to advance new theories, or to secure a rehearing on the merits"). The allegations of bias based on the Court's conclusion that McDonald was able to timely respond to discovery and the Court's Orders do not present a basis for granting the Rule 59(e) motion.

McDonald also contends the Court was biased

against him because it denied his motion for appointment of counsel.[2] The denial was based on the uncomplicated issues presented in this employment discrimination case and McDonald's capacity to develop and articulate arguments in a meaningful way. *See McCall v. Bensen*, 114 F.3d 754, 756 (8th Cir. 1997). McDonald does not dispute that he was capable of developing and articulating arguments in this action, and "[a] pro se litigant has no statutory or constitutional right to have counsel appointed in a civil case." *Stevens v. Redwing*, 146 F.3d 538, 546 (8th Cir. 1998). Consequently, the denial of McDonald's motion to appoint counsel does not demonstrate bias or provide a basis for granting the Rule 59(e) motion. To the extent McDonald relies on adverse rulings to establish bias, an unfavorable judicial ruling does not raise an inference of bias. *Harris v. Missouri*, 960 F.2d 738, 740 (8th Cir. 1992). The Court denies McDonald's Rule 59(e) motion insofar as it is based on allegations of bias.

Finally, McDonald maintains that the dismissal denied him his Seventh Amendment right to a jury trial. "[I]t is axiomatic that a party does not have a right to a jury trial if a dismissal sanction is

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[2] McDonald also moves to strike Defendants' memorandum in response to his Rule 59(e) motion because it referenced his previous litigation experience when arguing that the denial of his motion for appointment of counsel was appropriate. McDonald contends the magistrate judge denied Defendants' "attempts to inquire into [his] previous litigation" experience and that Defendants sought to undermine the magistrate judge's authority in referencing that experience. The Court rejects the argument that referencing publicly available facts for the purpose of showing that McDonald is not an inexperienced litigant was an attempt to undermine the magistrate judge's authority, and therefore denies McDonald's motion to strike.

properly imposed." *Richardson v. Safeway, Inc.*, 109 F. App'x 275, 279 (10th Cir. 2004). McDonald submits no evidence indicating the dismissal sanction was improperly imposed. The Court therefore denies McDonald's Rule 59(e) motion insofar as it is based on the Seventh Amendment.

Based on the files, records, and proceedings herein, and for the reasons stated above, IT IS ORDERED THAT:

1. McDonald's request to file a reply memorandum [Docket No. 163] is GRANTED.
2. McDonald's motion to strike Defendants' response memorandum [Docket No. 163] is DENIED.
3. McDonald's Motion to Amend Judgment [Docket No. 160] is DENIED.

Dated: July 30, 2010

s/ Joan N. Ericksen
JOAN N. ERICKSEN
United States District Judge